



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 26, 1998

Ms. Linda Cloud  
Executive Director  
Texas Lottery Commission  
P.O. Box 16630  
Austin, Texas 78761-6630

OR98-1552

Dear Ms. Cloud:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 116286.

The Texas Lottery Commission (the "commission") has received a request for "a copy of all non-confidential and confidential portions of the Lottery's current instant ticket contract with Dittler Brothers and the assignment to BABN." In response to the request, you submit to this office for review the information which you assert is responsive. You explain that some of the requested information may be proprietary in nature and protected from disclosure by sections 552.101, 552.104<sup>1</sup> and 552.110 of the Government Code. Gov't Code § 552.007; Gov't Code § 552.305. We have considered the exceptions you claim and have reviewed the documents at issue.

Since the property and privacy rights of a third party may be implicated by the release of the requested information, this office notified Dittler Brothers, Inc. ("Dittler Brothers") about the request for information. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). The notification states that if the company does not respond within 14 days of receipt, this office will assume that the company has no privacy or property interest in the requested information. Dittler Brothers did not respond to our notification. However, among the submitted information, you included a letter wherein Dittler Brothers assert that they have

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<sup>1</sup>We begin by disposing of the section 552.104 claim. Section 552.104 is not applicable to protect the proprietary interests of a third party. See Open Records Decision No. 592 (1991).

“no objection to . . . providing [the requestor] with the requested information, except for Appendix B . . . which was marked as confidential.”<sup>2</sup> Since you claim section 552.110 on the company’s behalf, we will consider whether the information at issue is excepted from disclosure under section 552.110.

Section 552.110 protects the property interests of private persons by excepting from disclosure two categories of information: (1) “[a] trade secret” and (2) “commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.” This office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). Facts sufficient to show the applicability of these factors have not been provided. See Open Records Decision No. 363 (1983) (third party duty to establish how and why exception protects particular information). Therefore, the requested information is not excepted from disclosure under the trade secret prong of section 552.110.

We next consider whether the information at issue constitutes “commercial or financial information.” Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In applying the “commercial or financial information” branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). See Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. See *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

“To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure.” *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted). You have not established that releasing the requested information would likely cause Dittler Brothers to suffer substantial competitive injury. Therefore, we conclude that the requested information is not excepted from disclosure pursuant to section 552.110.

Finally, we consider whether section 552.101 excepts any of the submitted information. Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision.

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<sup>2</sup>We note that information is not confidential under the Open Records Act simply because the party submitting it to a governmental body anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987).

We have examined the submitted information and we are not aware of any law that makes the requested information confidential, nor do you raise any such statute. Accordingly, we conclude the commission may not withhold the submitted information based on section 552.101 of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Sam Haddad". The signature is fluid and cursive, with a large loop at the beginning.

Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/rho

Ref: ID# 116286

Enclosures: Submitted documents

cc: Mr. C. Gray Bethea, Jr.  
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